STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the STANLEY BEDNARZ TRUST.

EVA SMIGIELSKI and LORRETTA SMIGIELSKI,

Petitioners-Appellants,

v

LUCYNA M. GLANTY, a/k/a LUCYNA M. GALANTY,

Respondent-Appellee.

UNPUBLISHED
June 16, 2009

No. 283699
Macomb Probate Court
LC No. 2006-189318-TV

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Petitioners, Eva Smigielski and Lorretta Smigielski, appeal as of right an order denying their petition to set aside a trust and a will executed by Stanley Bednarz.[1] We affirm.

Legal Capacity

Petitioners argue that the probate court clearly erred when it found that Bednarz possessed legal capacity to execute the trust and will. This Court reviews a trial court's findings of fact in a bench trial for clear error. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.* at 99.

A person executing a will or a trust must have legal capacity. *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001); 76 Am Jur 2d, Trusts, § 49, pp 88-89. To have legal capacity to create a will, a person must be able to: 1) "'comprehend the nature and extent of his

[1] Eva was Stanley's first cousin and her daughter, Lorretta, was Stanley's second cousin.

property,"' 2) "'recall the natural objects of his bounty,"' and 3) "determine and understand the disposition of property which he desires to make."' *Persinger, supra* at 504, quoting *In re Vollbrecht Estate,* 26 Mich App 430, 434; 182 NW2d 609 (1970). In other words, a person must know the property he owns, to whom he wishes to give the property, and how the will disposes of the property. *Id.* Likewise, legal capacity to create a trust is similar to the capacity to create a contract. 76 Am Jur 2d, Trusts, § 49, pp 88-89. "The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged." *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993).

Courts presume capacity and the burden is on a challenger to prove otherwise. *Vollbrecht, supra* at 434. "[T]estamentary capacity is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution." *In re Estate of Powers,* 375 Mich 150, 158; 134 NW2d 148 (1965).

Bednarz's attorney, Jeffrey Michalowski, was the only witness to testify regarding Bednarz's legal capacity at the time of the signing on October 6, 2006. *Id*. at 158. First, he opined that Bednarz understood the nature and extent of his property. *Persinger, supra* at 504. During an earlier meeting, Bednarz had verbally itemized his assets. Moreover, immediately before the signing, Michalowski reviewed the key provisions of the instruments to Bednarz and Bednarz discussed them with understanding.

Second, Michalowski opined that Bednarz understood the natural objects of his bounty. *Id.* He explained his familial relationship to respondent, Lucyna M. Glanty, a/k/a Lucyna M. Galanty ("Lucy"), Lydia Smigielski Bologna, and Eva. He instructed that Lucy receive the bulk of his estate, and made specific bequests for Lydia, Lydia's children, and Lucy's children. After review of these provisions immediately before the signing, Bednarz declined Michalowski's offer to make additional bequests that he may have forgotten.

Third, Michalowski opined that Bednarz understood the nature and effect of the trust and the disposition of the property under the will. *Id.; Erickson, supra* at 332. Bednarz's inquiries during the review of the provisions, immediately before the signing, exemplified his understanding. Michalowski testified that Bednarz asked a typical question of testators who execute both a trust and a will, questioning the necessity of a will in light of a trust. After Michalowski explained that a will is necessary in case a trust is not funded properly, Bednarz understood their purposes. These facts supported the probate court's finding of legal capacity based on Michalowski's opinion.

Citing to the testimony of Bednarz's psychiatrist, Dr. Prameela Baddigam, petitioners maintain that Michalowski's opinion regarding Bednarz's legal capacity could not outweigh medical evidence to the contrary. However, our Supreme Court has stated that, "[t]he opinion of a physician as to mental competency, aside from the question of insanity, is entitled to no greater consideration than that of a layman having equal facilities for observation." *Bradford v Vinton*, 59 Mich 139, 154; 26 NW 401 (1886). And, this Court "will not set aside a nonjury award merely on the basis of a difference of opinion." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). In any event, the trial court did not clearly err when it found Michalowski's testimony more credible with respect to legal capacity than Dr. Baddigam's

testimony. Although Dr. Baddigam disagreed with Michalowski's legal capacity opinion, she was not present to evaluate his condition during the signing. Her opinion was only based on Bednarz's past medical records and her past treatment of him. Furthermore, Dr. Baddigam never tested Bednarz's legal capacity and she stated that it would be better to defer to Michalowski's judgment. In light of these facts, we will not overturn the trial court's findings.

Petitioners next maintain that Bednarz was generally mentally incompetent because he exhibited memory and information processing lapses following his stroke. Thus, they argue that Bednarz could not have possessed legal capacity requiring memory and information processing at the time of the signing. On the contrary, however, the testimony of a qualified expert, Dr. Bradley Sewick, supported the trial court's conclusion. Dr. Sewick explained that some vascular dementia patients experience varying lucidity, comprehension, and communication capabilities from day to day and hour to hour. And, the record is replete with evidence of Bednarz's varying lucidity. For example, during Bednarz's first visit with Dr. Baddigam on September 20, 2006, he demonstrated confusion, claiming he lived with his mother who is deceased. Dr. Baddigam could not pursue mental testing during that particular appointment because of his lack of memory and comprehension. In contrast, during this same period of time, Bednarz discussed current events with his nurse's aid and visitors. He read the newspaper and scolded Michalowski when he was late for a meeting. He also reminded Lucy, who was handling his affairs as his power of attorney, to send his cousin a card and gift for his birthday. In light of Bednarz's varying lucidity, the probate court did not clearly err when it found that Bednarz could have been experiencing a lucid moment at the time of the signing.[2]

Discovery Sanctions

Next, petitioners argue that the probate court abused its discretion when it precluded handwriting expert, Dr. Robert D. Kullman, from reviewing or testifying regarding his opinions of the original copies of the power of attorney, will and trust. Petitioners did not include this challenge in their Statement of Questions Presented. Therefore, it is not properly before this Court. See MCR 7.212(C)(5); *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

[2] We reject petitioner's contention that it was speculative for the probate court to rely on medical consent forms that Bednarz signed to indicate additional moments of lucidity following the stroke. The evidence supported the trial court's inferences. Bednarz signed a percutaneous endoscopic gastrostomy ("PEG") consent form stating that he understood the procedure, and read and understood the consent form. Thereafter, a physician attested that he secured the consent. Likewise, Bednarz signed an anesthesia and medication consent form, acknowledging that he understood that anesthesia and medication may be necessary and risks were involved, and that he read the consent form and understood it. Thereafter, a nurse witnessed Bednarz's signature. Dr. Baddigam indicated that allowing Bednarz to sign these forms without his understanding would be a breach of the standard of care. Thus, it could be inferred that Bednarz demonstrated some level of lucidity when he signed these forms, and further demonstrated that Bednarz experienced varying lucidity and suggested that he could have experienced a lucid moment at the time of signing.

However, even if we were to consider this argument, the probate court's sanctions would not constitute an abuse of discretion. The court's rationale was sound, taking into consideration the timing of the request and the possible prejudice to respondents.

Directed Verdict – Fraud

Petitioners also argue that because there was evidence of fraud in the execution of the power of attorney, will and trust, the probate court erred when it granted Lucy's motion for a directed verdict. In a bench trial, a motion for a directed verdict is properly reviewed as a motion for involuntary dismissal under MCR 2.504(B)(2). "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), quoting MCR 2.504(B)(2). MCR 2.504(B)(2) permits a trial court to make findings of fact when ruling on a motion for involuntary dismissal. *Id.* This Court reviews the trial court's legal ruling de novo and its findings of fact for clear error. *Id.*

The elements of actionable fraud are:

> (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. [*Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005).]

On appeal, petitioners cite specific facts that they allege demonstrated a right to relief, thereby precluding a directed verdict. *Samuel D, supra* at 639. First, petitioners note that Michalowski testified that he generally provides clients with two original copies of testamentary documents, but that "[s]omething must have happened to the second set" of original copies because they were not introduced at trial. Petitioners fail to argue how these facts support their fraud claim and we conclude they are inapposite.

Second, petitioners note that Michalowski gave Bednarz four written questions regarding the management and distribution of his estate during their meeting on September 15, 2006. Days later, Lucy provided Michalowski with written responses to those questions, claiming Bednarz had instructed her to write them. Petitioners cite Dr. Baddigam's and Michalowski's testimony to suggest that Bednarz could not have understood the questions or written the responses on the date of the meeting. Again, petitioners fail to articulate how these facts support their fraud claim, as opposed to their legal capacity claim. Nevertheless, a trier of fact may have inferred that Lucy, not Bednarz, composed the responses, satisfying the material representation element of fraud. *Novi, supra* at 253 n 8. Even if this were true, it was not clear error to find that the material representation was not false or contrary to Bednarz's intent. *Id.* Rather, Michalowski testified that the responses were consistent with his previous conversations with Bednarz about his intent for the will and trust, which he subsequently executed with legal capacity. Absent evidence that the responses were false, petitioners showed no right to relief for fraud. *Samuel D,*

supra at 639. The probate court did not err when it granted Lucy's motion for a directed verdict on this ground.

Third, petitioners allege that several facts demonstrated a right to relief for silent fraud. To prove silent fraud, the charged party need not make a verbal material representation. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Rather, the material representation could result from the suppression of facts that create a false impression to the charging party. *Id.; Hord v Environmental Research Institute* (*After Remand*), 463 Mich 399, 412; 617 NW2d 543 (2000). The charging party must rely on the false representation created by suppression. *Hord, supra* at 412. A charging party may only recover for silent fraud if the charged party had a legal or equitable duty of disclosure. *Id.* Our Supreme Court explained that "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* at pp 412-413.

Petitioners assert that Lucy was aware of Bednarz's psychiatric evaluation, treatment by a psychiatrist, and administration of antipsychotic drugs for vascular dementia, but fraudulently failed to inform Michalowski of his condition. During an intake interview in which Michalowski questioned Bednarz's condition, Lucy specifically stated that he was physically able to walk, oriented to time, place, and person, and could sign documents. However, Lucy failed to inform Michalowski of Bednarz's vascular dementia diagnosis or psychiatric treatment.[3] Arguably, a trier of fact could have found that Lucy's failure created a false impression regarding Bednarz's condition. *Bergen, supra* at 382. Nevertheless, petitioners failed to demonstrate that Michalowski relied on the false impression of Bednarz's condition when he drafted and facilitated the execution of the will and trust. *Hord, supra* at 412. Rather, Michalowski independently assessed Bednarz during their meetings and found that he possessed legal capacity at the time of the signing.

Petitioners also argue that Lucy was aware of Eva and her children, but fraudulently failed to inform Michalowski of them when she diagramed Bednarz's family tree during a meeting. Again, Lucy's failure could have created a false impression regarding Bednarz's family tree, *Bergen, supra* at 382, but petitioners failed to demonstrate that Michalowski relied on the false impression when he drafted the will and trust. *Hord, supra* at 412. Instead, Michalowski testified that he drafted the will and trust according to Bednarz's requests, which were communicated during their meetings. Absent evidence of reliance on the asserted false impressions in the record, petitioners showed no right to relief for silent fraud. *Samuel D, supra* at 639. The probate court did not err when it granted Lucy's motion for a directed verdict of their silent fraud claim.

Directed Verdict – Undue Influence

[3] There was a question of fact at trial regarding whether Lucy was actually aware of the medical findings and treatment.

Petitioner's final argument is that the probate court erred when it granted Lucy's motion for a directed verdict of their undue influence claim. To establish a claim of undue influence, the charging party must demonstrate:

> "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." [*In re Peterson Estate*, 193 Mich App 257, 259; 483 NW2d 624 (1991), quoting *In re Estate of Mikeska*, 140 Mich App 116, 120; 362 NW2d 906 (1985).]

A presumption of undue influence attaches to a transaction where the evidence establishes:

> "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary (or an interest which he represents) benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in that transaction." [*Peterson*, *supra* at 260, quoting *Mikeska*, *supra* at 121.]

If a charging party establishes a presumption of undue influence, a "mandatory inference" is created:

> "shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion." [*Peterson*, *supra* at 260, quoting *Mikeska*, *supra* at 121.]

In this case, the facts supported a presumption of undue influence, *Peterson*, *supra* at 260, because it was undisputed that Bednarz gave Lucy his power of attorney and entrusted some of his financial affairs to her prior to the signing. It was also undisputed that Lucy benefited from the will and trust. Specifically, she was named the co-trustee of the trust, she and her husband received Bednarz's house, and she received the remainder of Bednarz's estate. Lastly, Lucy had an opportunity to influence Bednarz's decision in the transaction. She visited him daily and, as Eva and Lydia suggested, he was isolated, or isolated himself, from other family members.

Despite the presumption of undue influence, which shifted the burden of going forward with contrary evidence to Lucy, the probate court did not clearly err when it found that the presumption had been rebutted. *Peterson*, *supra* at 260. Witnesses testified that Bednarz was strong-willed, stubborn, and would not be easily influenced. He had independent legal counsel, Michalowski.[4] See *Kar v Hogan*, 399 Mich 529, 536, 542-544; 251 NW2d 77 (1976) (the presumption of undue influence was rebutted because the decedent sought out and retained

[4] Petitioners suggest that Michalowski was not independent. However, there is no evidence to support a claim that he had a stake in the will and trust. Rather, Michalowski testified that he would not "put [his] career on the line to forge documents for a $1,700.00 [attorney] fee."

independent counsel and supplied the impetus behind the procurement of a challenged deed). Moreover, Michalowski opined that Bednarz was not susceptible to threat, misled to sign the documents, or unduly influenced. Petitioners suggest that Michalowski did not actually provide counsel. However, the record evidences numerous meetings between Michalowski and Bednarz, during which Michalowski advised Bednarz on short and long term goals and recorded his wishes with respect to the estate. Most importantly, Bednarz expressed his wishes independently from Lucy, who was absent during his meetings with Michalowski. Because Lucy rebutted the presumption of undue influence, the petitioners' burden of persuasion remained. Eva and Lydia testified that they had no additional personal knowledge of undue influence. Thus, the probate court did not err when it granted Lucy's motion for a directed verdict of the undue influence claim.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray